United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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P/S

75-4027

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75—4027

SID FARBER and NADIA FARBER,

Petitioners-Appellants,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

BRIEF FOR PETITIONERS-APPELLANTS

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ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in refusing to decide the basic underlying question of the authenticity of the painting entitled "Susanna" as a work of Tintoretto in determining its value?

The court below refused to decide the question of the authenticity of the painting but found as an ultimate fact the fair market value of the painting on December 29, 1966.

2. Whether the trial court's decision as to the value of the painting was clearly erroneous as unsupported by any substantial evidence?

It is submitted that the trial court committed reversible error in making the ultimate finding that the fair market value of the painting in question was $10,000 on December 29, 1966 while refusing to decide first the critical question of authenticity. It is further submitted that the trial court also committed reversible error in basing its finding on the testimony of two unqualified witnesses who only examined the painting for the first time on the morning of trial, and then for forty minutes.

STATEMENT OF THE CASE

Nature of the Case and Prior Proceedings

The petitioners own a substantial and most valuable collection of fine paintings. As evidenced at trial, the

petitioners' collection was publicly exhibited in 1964 in Milan, Italy and in 1966 in Athens, Greece. On both occasions, the 16th Century painting entitled "Susanna" by Jacopo Robusti Tintoretto was exhibited as part of the petitioners' collection.

On December 29, 1966, the petitioners donated the aforementioned Tintoretto to Hofstra University. The painting was valued on the date of gift at $150,000.00.

The gift was claimed as a charitable deduction by the petitioners in 1966 and 1967. Thus, $79,264.60 was deducted on the 1966 return in question, and $70,735.40 was carried forward and deducted on the 1967 return.

On March 27, 1970 the petitioners were mailed a notice of deficiency for the calendar years 1966 and 1967, in the amounts of $37,307.94 and $35,415.23 respectively. The basis for the deficiency alleged by the respondent was the valuation of $2,000.00 placed upon the painting by respondent's "art council", which in point of fact never examined the painting in question.

The petitioners requested the respondent to supply the names of experts acceptable to it who could examine the painting and pass upon its authenticity and value. Two persons were named by the respondent; one replied that he was not an expert on Tintoretto and the other stated that his employer prohibited his authenticating works.
In their attempt to resolve the dispute with respondent,

petitioners contacted Professor Giuseppi Fiocco in 1970. Professor Fiocco was at Padua University and was recognized as an expert on Tintoretto. Professor Fiocco had already given an expertise authenticating the painting in question. Because he was then 86 years of age, he could not travel, and was thus available only on questions propounded in Italy. The respondent resisted the petitioners' application to so examine Professor Fiocco, and although the petitioners' motion was granted after a year by the Tax Court, Professor Fiocco died before he could be examined.

Finally, the petitioners obtained and offered by interrogatories the testimony, published article and expertise of Professor Giovanni Mariacher. Professor Mariacher is also a world renowned expert on Tintoretto, and the Director of the Civic Museums, Venice, Italy. Additionally, the petitioners obtained the analysis and opinion of Mr. John LaMarre, an authenticator and appraiser specializing in the study of Tintoretto, and Elizabeth Ives Bartholet, a respected appraiser, recognized and conducting her appraising services in New York City. Both Mr. LaMarre and Mrs. Bartholet testified at trial. All these witnesses for the petitioners set the value of the painting, at the time of gift, at not less than $150,000.00.

The petitioners also made available to the respondent five independent expertises, each given by a pre-eminent authority on Tintoretto. In each instance, the expert involved person-

ally examined the painting in question and, pursuant to the custom in the art trade, confirmed the authenticity of the painting as the autographic work of Tintoretto, by detailing his examination and opinion of authenticity in the expert's own handwriting on the back of an 8" x 10" photograph of the painting.

Four of the expertises were given in 1928, with one being reconfirmed in 1970; a fifth was given in 1949.

It is noteworthy that each expertise was given by a world renowned authority long before any controversy on the authenticity or value of the painting was raised.

The respondent conceded the genuiness of the expertises.

The respondent's evidence, such as it was, was belatedly assembled as trial approached. A few weeks before trial, the respondent contacted Mrs. Kathleen Posner. Mrs. Posner is an art teacher, who has never before authenticated or appraised a painting. She agreed to testify for the respondent without having first examined the painting in question.

In the last week before trial, the respondent contacted Mr. Bert Norton, an art dealer with no expertise regarding Tintoretto. Like Mrs. Posner, Mr. Norton agreed to testify against the petitioners without first examining the painting.

These two unqualified witnesses examined the painting for the first and only time forty minutes before trial com-

menced. They were the only witnesses called by the respondent; and the respondent offered no documentary evidence whatsoever.

Before trial commenced, Judge Tannenwald asked if a settlement might be reached. The respondent, as it had from the beginning, refused to offer one cent above the unsupportable $2,000.00 figure set by the "art council". The reason for the refusal only became clear after the trial. The respondent had no experts to rebut the petitioners' proofs, and indeed, had not even contacted witnesses until trial was about to commence.

After trial the Court rendered its decision that the painting in question had a value on December 20, 1966 of $10,000.00. It is submitted that the trial court committed reversible error in so deciding. As set forth below in Points I and II, the trial court has failed to discharge its obligation as trier of fact both through its refusal to decide the critical question of the authenticity of the painting and in its consideration of the evidence as a whole. As detailed in Point I, the Court's reluctance to consider the evidence before it regarding authenticity was evidenced from the outset of the trial and is indicative of the Court's failure to consider fully all the evidence before it. The failure of the trial court to discharge its obligation as trier of fact is thus the gravamen of this appeal and the two interrelated arguments which are herein presented. Although appellants have divided their argument into two points for the convenience of this Court, they should therefore be considered together.

A detailed statement of the relevant facts adduced at trial is dispensed with at this juncture, inasmuch as the evidence is examined closely below at Point II, infra.

It is submitted that the authorities cited below require a reversal by reason of the prejudicial and erroneous factual findings and conclusions of law made by the trial court.

POINT I

THE TRIAL COURT WAS REQUIRED TO DECIDE THE UNDERLYING QUESTION OF THE AUTHENTICITY OF THE PAINTING IN DETERMINING ITS VALUE

It is elementary that the authenticity of a work of fine art is the critical factor in determining its value. The mere fact that a painting, for example, has been authenticated as done by the hand of Rembrandt, Renoir or, as in this case, Tintoretto, is an independent factor, apart from condition, subject matter, etc., in determining its value. Judge Tannenwald, who tried this matter in the Tax Court, has himself recognized the signal importance of determining authenticity in his opinion in Eugene P. Mathias, 50 T.C. 994 (1968), wherein he stated:

> The problem of valuation revolves around three elements: 1) the authenticity of the painting, i.e., whether it was done by Gilbert Stuart, 2) the identity of the subject, i.e., whether it was a portrait of Sir John Jervis, and 3) the quantum of restoration.

As again emphasized by Judge Tannenwald:

> It is clear to us that the identity of the subject matter and of the artists has a marked effect on value. (Emphasis added.) (CCH Tax Ct. Rptr. Dec. 29, 160 page 2861.)

Despite the evident and critical significance of determining the authenticity of a work of art as a preliminary to a finding of value, the Court below consistently and adamantly refused to make such a finding. Astoundingly, the Court

foreshadowed its erroneous course even before it heard any of the evidence presented at trial, stating:

> . . . I am going to avoid making a finding of authenticity if I possibly can. I will deal with value. I will deal with the impact, if any, of any doubts as to authenticity on the value. But, I will hopefully avoid the question of determining whether the particular painting is or is not a genuine Tintoretto. (Emphasis added.) (T.6)*

Judge Tannenwald's resolve not to decide the issue of authenticity was manifested throughout the trial and was stated with finality in his decision wherein he concluded:

> Furthermore, we again refuse to decide the underlying question of authenticity. . . . Accordingly, we find as an ultimate fact that the fair market value of "Susanna" on December 29, 1966 was $10,000 and that petitioners' deduction should be limited to this amount. (A.26, 27)**

The Court's inexplicable refusal to decide the question of authenticity was clearly and prejudicially erroneous. Manifestly, the Court's refusal to deal with the critical issue of authentiticy stemmed from its recognition that it is "a difficult area [authenticity]." (A.20) Thus, the Court has rejected its obligation to determine a critical issue of fact in the action on the ground that it is complex, difficult and not within the particular knowledge of the Court. Certainly, a court may not refuse to discharge its

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*All references to the trial transcript are denominated "T".

**All references to the appendix are denominated "A".

duty as a trier of fact merely because the task is "difficult." The Court's task is no greater than that in countless instances where a judge, sitting without a jury, must determine complex matters of patent law, finance, state of mind, and other issues for which he has no particular expertise or professional training.

FRCP Rule 52(a) Required a Finding Below on Authenticity

Rule 52(a) of the FRCP provides in part as follows:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . . (28 U.S.C. Rule 52(a))

26 U.S.C. § 7482(a) makes decisions of the Tax Court subject to review in the same manner as decisions of the district courts and places upon the Tax Court the obligation to make such findings as required by Rule 52(a). 26 U.S.C. § 7482(a) provides in part as follows:

> The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.

It is well settled that where a Court fails to make findings on a critical issue, the Court of Appeals will not make amends for the failure but rather will vacate the judgment. Marlborough Corporation v. United States, 172 F.2d 787 (9th Cir. 1949); Mladinich v. United States, 371 F.2d

940 (5th Cir. 1967); Southland Corporation v. Campbell, 358 F.2d 333 (5th Cir. 1966). Moreover, where a Court merely makes a finding of ultimate fact without stating the underlying factual foundations upon which it is based, it has failed to meet the requirements of Rule 52(a). O'Neill v. United States, 411 F.2d 139 (3rd Cir. 1969).

In O'Neill, supra, the Court of Appeals vacated a decision denying a plaintiff recovery on the grounds that he was contributarily negligent, stating at 411 F.2d 146:

> Rule 52(a) requires that the trial court "shall find the facts specially and state separately its conclusions of law thereon." This requirement is not met by the statement of the ultimate fact without the subordinate factual foundations for it which also must be the subject of specific findings. This is especially true in cases like this, involving the application of factual findings to the ultimate judgment whether conduct reached the level of due care. (Emphasis added.)

As set forth hereinabove, Judge Tannenwald refused to decide "the underlying question of authenticity", and proceeded to the ultimate conclusion of fair market value. His failure to make the critical underlying finding with respect to authenticity was substantial error. Without such a finding, his decision as to value floats with no underpinning in the trial record whatsoever.

It is clear that the trial court, in refusing to decide the question of authenticity, founded its decision as to value on an incorrect theory of law. It is well settled that where the Tax Court applies the incorrect theory or standard

of law, it must be reversed. Kitchin v. C.I.R., 340 F.2d 895 (4th Cir. 1965); Municipal Bond Corporation v. C.I.R., 341 F.2d 683 (8th Cir. 1965).

In Municipal Bond, supra, the Court of Appeals stated at 241 F.2d 686:

> It is quite true that the clearly erroneous standard of Fed.R.Civ.P. 52(a) applies to findings of fact made by the Tax Court. However, it is equally clear that findings of fact induced by an erroneous view of the law are not binding upon this court. Greenspon v. Commissioner, 8 Cir., 229 F.2d 947, 949; Marcella v. Commissioner, 8 Cir., 222 F.2d 878, 881.

Moreover, the Courts have uniformly held that the proper criterion to be applied in determining fair market value is a question of law and the application of the wrong criteria by the Tax Court, if prejudicial, is reversible. Maytag v. Commissioner of Internal Revenue, 187 F.2d 962 (10th Cir. 1951); Collins v. Commissioner of Internal Revenue, 216 F.2d 519 (1st Cir. 1954).

In Maytag, supra, the Court of Appeals stated at 187 F.2d 964:

> The taxpayer also directs our attention to the rule that the question of the proper criteria or criterion to be employed in determining the market value of property transferred as a gift is a question of law reviewable in the court of appeals. The criteria or criterion to be employed in a proceeding of this kind in determining the value of gifts is a question of law, and if it appears on review that the Tax Court employed the wrong or insufficient criteria or criterion in arriving at its determination

> of value to the prejudice of the taxpayer, the decision will be reversed and the proceeding remanded to that court. Powers v. Commissioner, 312 U.S. 259, 61 S.Ct. 509, 85 L.Ed. 817; Helvering v. Maytag, 8 Cir., 125 F.2d 55; Zanuck v. Commissioner, 9 Cir., 149 F.2d 714, 160 A.L.R. 661. (Emphasis added.)

Since, as set forth above, the underlying question of authenticity was critical to a determination of value, the trial court's finding of value, in vacuo, was based on a manifestly incorrect theory of law. Accordingly, it is mandated that the trial court's decision be reversed.

POINT II

THE DECISION OF THE TAX COURT WAS CLEARLY ERRONEOUS AND WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

As set forth hereinabove in Point I, decisions of the Tax Court are subject to review "in the same manner and to the same extent as decisions of the district courts in civil actions without a jury," 26 U.S.C. § 7482(a). In enacting the foregoing provision Congress specifically repudiated the Supreme Court's ruling in Dobson v. Commissioner, 320 U.S. 489, 64 S.Ct. 239 (1943), the effect of which was to limit the scope of review of tax cases coming from the Tax Court. Thus, the decision of the Tax Court herein is subject to the standards of review provided in Rule 52(a) of the Federal Rules of Civil Procedure. With respect to the standard of review provided in Rule 52(a), the Supreme Court stated as follows in United States v. United States Gypsum Co., 333 U.S. 364, 68 S.Ct. 525, 542:

> Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where "clearly erroneous". . . . A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

The "clearly erroneous" rule has been uniformly applied in the review of Tax Court decisions. C.I.R. v. Duberstein, 363

U.S. 278, 80 S.Ct. 1190 (1960); Greenspon v. Commissioner of Internal Revenue, 229 F.2d 947 (8th Cir. 1956). Moreover, the Courts have frequently overturned findings as to the value of property when a consideration of the evidence demonstrates such findings to be clearly erroneous. Carlton v. Commissioner of Internal Revenue, 190 F.2d 183 (5th Cir. 1951); Buck v. United States, 154 F.Supp. 90 (Dist. Del. 1957).

As set forth in Carlton and Buck, supra, the mere fact that the determination of the trial court is based on an evaluation of "expert" or "opinion" evidence is no reason to uphold an erroneous finding as to value. In Carlton, for example, the Court of Appeals in reversing a finding as to the value of real property stated as follows at 190 F.2d 185:

> . . . a careful consideration of the evidence as a whole leaves us no doubt that the finding of the Tax Court, based as it was, in part upon opinion of evidence amounting to little more than a synthetic guess made five years after the critical date, was clearly erroneous.

As set forth in the trial record herein, this action was tried exclusively on the basis of "expert" or "opinion" testimony. As shall be demonstrated in detail below, the petitioners' evidence with respect to the two critical issues of authenticity and value stands unrebutted, and compels a reversal of the Tax Court's findings.

Summary of Evidence

It is settled that the petitioners' burden of proof was only to establish their case by a fair preponderance of the evidence. As the record below abundantly indicates, the petitioners more than sustained this burden; yet Judge Tannenwald willfully refused to decide the "difficult" issue of authenticity, and, rendered a decision singularly unsupported by the evidence.

The petitioners produced at trial the most compelling form of nondemeanor evidence on the authentiticy of the painting in question. This evidence consisted of the handwritten expertises of five world renowned authorities on Tintoretto. These expertises were rendered years before the present dispute on authentiticy, and by experts having no stake in the outcome of the dispute. The trial court apparently discounted the importance of the evidence, and in doing so, committed reversible error. As discussed below, this Court is free to examine such nondemeanor evidence de novo.

Moreover, the trial record discloses that the testimony and exhibits offered in evidence by the petitioners clearly established the value of the painting at $150,000.00 on the date of the gift. The respondent offered two unqualified witnesses, and no documentation which in any way rebutted the petitioners' claim. As detailed below, the trial court's ruling is not supported by any substantive evidence, and must accordingly be reversed as clearly erroneous.

The Expertises

It is well settled that, to the extent a trial is based upon nondemeanor evidence, depositions, written interrogatories or documents, the factual findings of the trial court are not accorded the same weight as its findings based on oral testimony, and that an appellate court may therefore consider the evidence de novo. Smyth v. Barneson, 181 F.2d 143 (9th Cir. 1950); Orvis v. Higgins, 180 F.2d 537 (2nd Cir. 1950), cert. den. 340 U.S. 810, 71 S.Ct. 37 (1950); A. J. Industries v. Dayton Steel Foundry Company, 394 F.2d 357 (6th Cir. 1968).

In Smyth, supra, the Court of Appeals for the Ninth Circuit stated at 181 F.2d 144:

> In order to rule with appellant Collector as to the non-existence of the debt, we must determine that the court's contrary finding was clearly erroneous. In determining this point we consider all of the evidence giving the written evidence the weight we deem it entitled to de novo and applying the oral evidence with "due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses." Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A. (Emphasis added.)

In A. J. Industries, supra, the Court of Appeals for the Sixth Circuit held that the trial court's finding of fact with regard to a particular issue in a patent infringement suit was clearly erroneous. The Court's observations with regard to the evidence introduced on the validity of the

patent in question are particularly relevant to the issues herein. The Court stated at 394 F.2d 361:

> The vast majority, if not all, of the witnesses who testified as to the prior art Crawford Oil trailer and suspension system had no pecuniary interest in the outcome of the suit. Cf. Corona Cord Tire Co. v. Donvan Chemical Corp., 276 U.S. 358, 382, 48 S.Ct. 380 (1928). With respect to the structure of the suspension on this trailer prior to the conception of the Ward invention, the testimony of these witnesses was sufficiently detailed as to evidence a familiarity of the subject matter. As noted above, this testimony was neither contradicted, nor otherwise impeached.
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> * * * *
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> The fact that the testimony of five of nine witnesses relating to the Crawford Oil trailer was offered by deposition does not deprive this evidence of probative weight. It does, however, militate against the conclusiveness generally given findings made by the District Court under Rule 52, F.R.Civ.P., since the trial judge had no opportunity to observe the witnesses. See Seagrave Corp. v. Mount, 212 F.2d 389 (6th Cir. 1954); Carter Oil Co. v. McQuigg, 112 F.2d 275 (7th Cir. 1940). (Emphasis added.)

The facts in A. J. Industries closely parallel those of the instant case and highlight the error of the trial court in disregarding the written expertises submitted by the petitioners. Petitioners submitted written expertises by the following experts:

> Prof. Giuseppi Fiocco (1884-1970), professor of the History of Art, University of Padua, Padua, Italy; Director and Curator of Old Masters, the Civic Foundation, Venice, Italy

Prof. Gustav Gluck, formerly Director of the Kunsthistoriches Museum, Vienna, Austria

Prof. Wilhelm Suida (1877-1961), formerly Director of the Kunsthistoriches Museum, Vienna, Austria

Dr. August L. Mayer (1885-1944), author of textbook on "Tintoretto" - published by R. Piper & Co., Munich, 1923

Dr. Georg Gronau (1868-1944), Director of Museum of Hanover, Hanover, Germany

The expertises offered by petitioners, like the expert testimony offered in A. J. Industries, were written by individuals who had no interest in the outcome of the litigation. Each of the expertises was based on an examination of the painting years before the instant controversy arose. Messrs. Fiocco, Gronau, Mayer and Suida authenticated the painting in 1928. Professor Fiocco reaffirmed his opinion in 1970, and Professor Gluck authenticated the painting in 1949. Unlike the experts called by the respondent, they had not merely viewed the painting on the day of trial, and, in several cases had examined it more than once.

All of the experts were unequivocal in their opinion that the painting was done by the hand of Tintoretto. Their reputations as experts stand completely unimpeached and their opinions, as set forth below, have not been rebutted. Respondent's own witness, Bert Norton, testified, "I knew some of these experts." (T.141) He specifically testified that the reputation of Wilhelm Suida was "very good" (T.158),

and that he had "great respect" for him. (T.159) With respect to August Mayer, Norton admitted, "August Mayer, I knew very well," also conceding Mayer's familiarity with Tintoretto. (T.155) The only criticism of any of the authors of the expertises was offered by Norton regarding Professor Fiocco, of whom he said, "I didn't think much of Fiocco." (T.158) Norton nonetheless conceded that the National Gallery thought highly enough of Professor Fiocco to have him authenticate the Tintoretto which hangs there. (T.158) Indeed, Professor Suida, relied upon by the petitioners, also authenticated the same Tintoretto at the National Gallery.

Moreover, a reading of the expertises immediately discloses both a familiarity with the subject painting and other paintings by Tintoretto of Susanna. Suida, for example, who authenticated a Tintoretto for the National Gallery and the Frick in Pittsburgh, contrasts the painting with works in the Lanz collection in Amsterdam and in the Dresden Gallery. (A.34) Gronau, Mayer and Fiocco compare the work to the Susanna in the Kunsthistoriches Museum in Vienna. (A.38, A.36, A.30)

Inexplicably, Judge Tannenwald, in his decision, makes only passing reference to the expertises, stating, in part:

> Four of these letters were executed in 1928 (one having been reaffirmed in 1970) and one in 1949. Respondent disputes their conclusions, but he has stipulated to

> the authenticity of these "expertises." Accordingly, they may properly be considered as part of the evidence, subject to our determination of the weight to be accorded them in light of their clearly hearsay status. J. Willard Harris, 46 T.C. 672, 674 (1966). (A.22)

It is evident that Judge Tannenwald has disregarded compelling evidence without reason. It was stipulated between the parties that the expertises are authentic. No objection either on the part of the respondent or the Court was made to their submission. No evidence whatsoever was introduced by the respondent which in any manner diminishes the reliability or persuasiveness of the expertises; and placing the label of "hearsay" on them in the light of the total absence of testimony to contradict or impeach the expertises truly begs the question. As set forth hereinabove, each of the expertises was given prior to any controversy regarding the authenticity of the painting by men who were eminent authorities and directors and custodians of the finest art collections in the world. Their reputations were at stake in the opinions they offered. They were unanimous and unequivocal in their opinion that the painting was authentic. Moreover, the persuasive force of the expertises is undeniable, particularly when contrasted with the self-contradictory and tentative testimony offered by the respondent's experts. It is submitted that had petitioners offered testimony of the caliber offered by respondent, they would

have failed miserably in carrying their burden of proof.

Clearly, the failure of the trial court to consider the expertises as compelling factors in determining the authenticity of the subject painting constitutes reversible error. However, as set forth in the authorities cited above, this Court may consider such evidence de novo and accordingly reject the finding of the trial court.

The Testimony

In addition to the written expertises discussed hereinabove, petitioners introduced the written testimony of Professor Mariacher and the oral testimony of John LaMarre and Elizabeth Bartholet, together with their written appraisals of the painting.

Respondents called one Kathleen Posner and Bert Norton. The testimony of each of the witnesses is examined in detail below. Petitioners are, however, compelled to note at the outset that respondent failed completely to introduce evidence to rebut petitioners' evidence on authenticity and value. Petitioners' witnesses, qualified experts, stated without reservation that the subject painting is authentic and that its value on the critical date was at least $150,000. In contrast, respondent's principal witness on authenticity, Kathleen Posner, was unable to form an opinion one way or another as to authenticity, while Bert Norton demonstrated that he was not qualified to render an acceptable opinion

on the subject at all. Neither of respondent's witnesses offered an opinion on the value of the painting as a genuine Tintoretto given its condition on the date in question. It is thus submitted that there is no credible testimony as to value to rebut that of the petitioners.

Petitioners' Case

Professor Mariacher

Professor Mariacher is the Director of the Civic Museums of Venice. (A.67)

He is a renowned scholar, particularly expert on works of Tintoretto, and he resides in Venice, Italy. A massive bibliography of Mariacher's works on Tintoretto and 16th Century art was submitted and made part of his sworn testimony. (A.67, 77, 78)

Professor Mariacher first learned of and viewed the painting in question at a serious public exhibition held in Milan in 1964. (A.68, 73)

Professor Mariacher submitted an expertise with respect to the painting, stating that it "is an original work of Jacopo Tintoretto." In addition, Professor Mariacher confirmed in sworn testimony his opinion that the work was an original work of Tintoretto. (A.88, 73)

Professor Mariacher further wrote an article for publication on the work in question which was accepted into evidence as part of his deposition. The article summarizes

Professor Mariacher's study and analysis of the painting. Mariacher's familiarity with Tintoretto's work is evident, and the Court's attention is respectfully directed to his comprehensive examination of the work and scholarship. (A.79, ff.)

In authenticating the painting, Mariacher also paid high respect to the other authorities whose expertises were placed in evidence. (A.73)

Mariacher placed the date of the painting after 1570. (A.72) He noted the restoration of the painting and commented that its value is unchanged by restoration. (A.68, 70)

He confirmed that his authentication was based on a firsthand physical examination of the work itself. (A.68)

Professor Mariacher stated his familiarity with Tintoretto's work also included his close following of all restorations of his work. (A.68)

In summary, the petitioners submitted the absolute sworn assurance of this expert, who not only resides in Venice, but whose work involves viewing innumerable original works by Tintoretto on a daily basis.

Professor Mariacher's testimony stands without rebuttal and by itself provides the basis for the relief sought.

John LaMarre

Mr. LaMarre testified for the petitioners on authenticity and appraised value.

Mr. LaMarre is an independent certified art appraiser

and has pursued this occupation for thirty-five years. (T.43) He has appraised and authenticated works continuously through this time. (T.43) His services are performed for individuals, estates, companies, insurance companies, and most importantly, he authenticates and appraises for the United States Customs and the Postal Department. (T.44) His work as an appraiser for the Government has been ongoing, on a freelance basis, for twenty years. (T.44) Mr. LaMarre teaches at New York University and the New York School of Interior Design. (T.45) His courses are attended by students as well as professional dealers and others in the art trade. (T.45) He formerly taught at the Cambridge School of Art. (T.45)

Mr. LaMarre devotes his entire time to authenticating, appraising and consulting in the fine arts fields, except for his teaching. (T.45) Mr. LaMarre has testified in litigations on appraisal and authenticity in fine arts over twenty times. (T.46)

Mr. LaMarre is a member of the American Society of Appraisers and has been listed by Who's Who of American Art. His publications have been circulated in the Magazine of Art, The New York Times, The Herald Tribune, and he has published technical evaluation for the American Society of Appraisers. (T.46) Mr. LaMarre has also collaborated on a two-volume work regarding the sculpture of Michelangelo published with

Martin Weinberger four years ago by Columbia University Press. (T.47) Prior to commencing his own firm twenty years ago, Mr. LaMarre was a research specialist with French & Company and thereafter was an appraiser and cataloger for Park-Bernet. He was also formerly employed at the Fogg Museum at Harvard University.

Mr. LaMarre's education commenced with an undergraduate degree in art history at N.Y.U., where he wrote his graduate paper on the comparative styles of Veronese and Tintoretto. He is presently engaged in an independent study of Tintoretto and has traveled to Venice in 1969, 1970 and 1972, where he has studied over two hundred of Tintoretto's works for the purpose of preparing new publications and a lecture series on Tintoretto. (T.48)

Mr. LaMarre saw the painting in question on three independent occasions. (T.49) The first two instances were at Hofstra University. (T.49) Parenthetically, it is noted that the respondent stipulated that the canvas of the painting in question was of the appropriate age for a work by the hand of Tintoretto. (A.14) Mr. LaMarre studied the canvas and measured the number of threads to an inch; he further stated that under the main surface is a red ground, typical of Tintoretto, where others used white or grey. (T.50) He stated the work was closely related to the "Susanna" that is in Vienna, differing mainly in variations which followed

Tintoretto's development of style. (T.50) Mr. LaMarre commented on the freer brush work and more direct approach to subject than that seen in earlier Tintoretto's. (T.50) He stated that Tintoretto worked more hurriedly as he developed his career. (T.51)

Mr. LaMarre commented that paintings "after Tintoretto" were identifiable by the hesitant and tentative application of brush strokes with paint tending to be piled up whereas the present work is thinly and rapidly painted. (T.52) LaMarre had studied the X-rays and stated that considering the amount of restoration all Tintorettos have undergone that the work in question is in excellent condition. (T.52-53) Mr. LaMarre noted the restoration evident to the naked eye, citing the chin line and other areas. (T.53)

On the subject of the expertises, Mr. LaMarre stated that each of the authorities offering an expertise was a recognized scholar. He is familiar with the work of Messrs. Fiocco, Gronau, Gluck and Mayer, and in particular, knew Professor Suida and identified the handwriting of Suida on the exhibit. (T.54-55) Mr. LaMarre stated that such authorities would never give expertises unless they were as certain as humanly possible, inasmuch as their reputations were on the line when offering an expertise. (T.56)

Mr. LaMarre prepared an appraisal as to the market value of the painting on December 29, 1966. He valued the painting

at $250,000.00 as of that date. He based his evaluation upon comparable sales which he collected from trade information and listings for the years prior to 1966. (T.57-59) (A.55)

Mr. LaMarre's scrutiny of the painting was over a period of an hour and a half for each of his visits at Hofstra. (T.59) His study commenced six weeks before the trial and concluded with a third examination in the courtroom before the commencement of the proceeding. (T.59) Mr. LaMarre also stated that while he could not precisely fix the date of restoration, it was done between twenty and thirty years ago and that there has been no restoration since December of 1966. (T.61) This testimony was not rebutted.

On Mr. LaMarre's cross-examination inquiry was directed to the extent of the restoration of the painting. Mr. LaMarre stated that the actual restoration was relatively slight considering the age of the painting and the condition of all works recovered from the 16th Century. (T.68)

Mr. LaMarre testified that Tintoretto rarely signed his work and that if this particular painting had not shown substantial restoration, he would be most suspicious of it as a recent copy or fake. (T.69)

Elizabeth Ives Bartholet

Ms. Bartholet testified, as permitted in the Tax Court, by submitting a written and sworn affidavit as to the appraised market value of the painting in question on December 29, 1966. Thereafter she was cross-examined as to the contents of her appraisal and further inquiry was permitted as to her general knowledge of the subject.

Ms. Bartholet is familiar with the works of Tintoretto and has studied his work firsthand, both as a child and as an adult. (T.18) As noted by the Court, however, Ms. Bartholet was called only as an expert on appraised value rather than authenticity. (T.25)

Her sworn affidavit of appraisal was submitted into evidence and was not questioned or attacked in any way by the respondent. (A.40) The respondent's cross-examination centered around the age of the painting and assertions of damage to it. Ms. Bartholet stated that she recognized that there had been some damage to the painting but that it was not extensive and that moreover, the X-rays showed that the restoration was of the kind expected for a painting of that period. (T.26) Most importantly, Ms. Bartholet testified that restoration did not affect the market value of the painting. (T.29) She stated that she could not imagine a totally unblemished Tintoretto of the 16th Century. (T.29)

During the cross-examination of Ms. Bartholet, the

petitioners introduced into evidence the catalogs which were publicly circulated when the work in question was exhibited as part of exhibitions held in Milan in 1964 and in Athens in 1966. (Petitioners' Exhibits 11 and 12, A.51) Ms. Bartholet stated that the expertises which accompanied the work confirmed her belief that the painting was an autographic work by Tintoretto. (T.36)

Ms. Bartholet placed the value of the painting as of December 29, 1966 at $200,000.00, well in excess of the value placed upon it by the taxpayers when making the donation. (A.42)

Respondent's Case

In addition to the stipulation of facts, the respondent offered the testimony of two witnesses. No sworn written reports were offered by either such witness.

Kathleen Wel-Garris Posner

Ms. Posner was called as an expert on authenticity.

Ms. Posner is a teacher of art history and an art historian at New York University. (T.77) She has been so employed for ten years. While she anticipates publishing a text by New York University Press, she presently has no books in print although she has written articles. (T.80) Ms. Posner has not ever authenticated a painting. (T.108)

In the month before trial, Ms. Posner was contacted by the respondent and agreed to testify on its behalf, before

ever viewing the painting in question. (T.114)

On the morning of the trial, Ms. Posner examined the painting in question for forty minutes. (T.118) This was the first and only examination that Ms. Posner made of the work in question. (T.118)

While called to testify on authenticity, Ms. Posner had limited remarks to make with respect to the genuineness of the work. Her testimony centered, rather, on the extent to which the painting had been restored. (T.93) It is noteworthy that at no time was Ms. Posner qualified as an expert in restoration or the care and condition of fine art. Nonetheless, her testimony was largely directed to the areas of the painting which had been damaged or restored. (T.93-94) Of critical importance is the fact that Ms. Posner, when questioned, never denied the authenticity of the painting. (T.95) Rather, she stated that it had undergone "adventures" which made it difficult to say whether or not Tintoretto had painted the work. (T.96)

In summary then, the Government's first expert on authenticity drew no conclusion on this critical subject and left the question open as to what effect, if any, restoration would have upon the appraised market value of the work.

Other less critical areas of Ms. Posner's testimony are worthy of comment.

It was surprising to note that although this witness was a professed expert on Tintoretto, she was totally unaware of the major Tintoretto sale in the last ten years. (T.98) Specifically, she had no awareness whatever of the sale of Tintoretto's "Christ by the Pool of Bethesda" at Christie, Manson & Woods, in 1963 for $160,000.00. (T.98)

Ms. Posner's testimony with respect to the merit of the expertises in evidence was not at all convincing. First she conceded all of the experts were known to her. (T.88; 100) She then testified that opinions could vary with respect to the authenticity of Tintoretto between 1928 and the present. However, when confronted with the fact that Professor Fiocco's expertise was updated by one in evidence executed in 1970, she had no response. It was also clear that she had not considered the expertise of Professor Mariacher and his article, both of which were executed in the 1960's. Further, she conceded that Professor Gluck's expertise had been given as late as 1949. (T.89)

In short, her remark that expertises are far more difficult to acquire since the Second World War tended to give further strength to petitioners' expertises from Messrs. Mariacher, Gluck and Fiocco. (T.90)

Ms. Posner admitted that she was not even contacted by the respondent until November or December of 1973. (T.115) She admitted that she had never seen the painting in question

until the morning she testified. (T.115)

Probing her professed knowledge of Tintoretto further, Ms. Posner was asked if she knew of the "Susanna" by Tintoretto hanging in the renowned Frick Museum in Pittsburgh. (T.115) Her first answer was that she was not aware of it; she then varied her answer and stated that she had never seen it but that she was aware of it. (T.115) When pressed further, she stated that she had "no special confidence about the picture." Having admitted that she had never seen it, she was asked what it was in her judgment that led her to question the painting's authenticity. Again, her answer was "the totality of my experience as an art historian." (T.115)

In summary, Ms. Posner has been an art historian, teaching for ten years. She has never authenticated a painting. She did not deny the authenticity of the painting in question and her total inspection of the work took forty minutes on the morning of trial.

It is submitted that her testimony could not be given serious weight in determining the merits of this case.

Bert Norton

Mr. Norton was called as an expert both on authenticity and value.

Mr. Norton was first contacted by the Government a week before the trial. (T.164) Norton's only examination of the painting in question took place with Ms. Posner, on the

morning of the trial. (T.164) Mr. Norton agreed to testify for the respondent without having seen the painting in question. (T.164)

Mr. Norton is by profession an art dealer, and he has been so occupied since 1927. Stated simply, he sells fine art. He is listed in the Yellow Pages as an expert on Dutch and Flemish paintings. (T.154) No educational or professional credentials were advanced by Mr. Norton other than his selling experience for himself.

When questioned, Mr. Norton acknowledged that his area of specialty was 16th Century and 17th Century Dutch painting rather than Italian or Venetian fine art. (T.153)

Mr. Norton has never authenticated a Tintoretto. (T.154) Mr. Norton has never authenticated a Venetian Renaissance painting. (T.154) Indeed, Mr. Norton conceded that he had never authenticated any painting. (T.154)

On the morning of the trial, Mr. Norton sat with Ms. Posner and examined the painting for forty minutes. This was his first and only examination of the work in question. (T.164)

However, Mr. Norton was quick to say some hours later that the work in question had all the "earmarks of a copy." (T.130) The Court commented that Mr. Norton's remark was a great general statement and drew his rejoinder that "it is not if you are in the business." (T.130) It became apparent

that Mr. Norton drew heavily if not exclusively upon his own instincts. Indeed, when asked the basis of his knowledge, he merely stated that "I've been at it for forty-six years, I've got to know something." (T.129) He later confirmed that "instinct plays a big part" in his decision-making process. (T.167)

In addition to his comments about instinct, Mr. Norton went further and stated that he does not rely upon expertises of others at any time. (T.155) Surprisingly, he at least conceded the scholarship and eminence of the authorities who gave expertises on the subject painting. (T.155-159) He then stated to the Court that he knew of no objective facts which would change the opinions which were rendered by the experts in 1928. (T.159-160) His answer was subsequently qualified somewhat by the concession that further scholarship could change some opinion. (T.160)

On the subject of copies or fakes, Mr. Norton stated that he believed that most of the phonies are "pretty well sorted out" today and that all works presently attributed to Tintoretto are in fact Tintorettos. (T.129; 127)

It is respectfully emphasized that on the question of authenticity of the work, Mr. Norton offered only his personal observations based upon his instincts as a dealer in Dutch and Flemish paintings. The balance of his testimony was devoted to the condition of the painting at the present

time and the art market in 1973-74.

Most of the time consumed with Mr. Norton's testimony was devoted to an examination of the work in question with a black light. Mr. Norton asserted that the painting had undergone substantial restoration. On the precise point of authenticity, his first statement was that he "has no idea who painted the canvas." When prompted further on his direct, he did state that he did not believe it was by the hand of Tintoretto. (T.149)

He stated a market value of the work in question of $2,000.00 -- the precise figure used by the Government in its notice of deficiency. (T.149) No comparable values or other objective factors were advanced by Mr. Norton to support his figure of $2,000.00.

Mr. Norton also placed great reliance on X-ray as a tool in determining the value or condition of a painting. Although the bulk of his testimony was devoted to the state of restoration of the work in question, Mr. Norton admitted on cross-examination that he had never examined any other Tintoretto with the exception of the putative one in his shop to determine the state of restoration. (T.162)

At that point petitioners' counsel approached the witness with X-rays and asked him if he were familiar with the state of restoration of the renowned "Susanna and the Elders" by Tintoretto, hanging in Vienna. (T.163) Somewhat startled,

Mr. Norton readily conceded that the Vienna "Susanna" is not "in the pink of condition." (T.163) He went on, "I think that there is restoration on that one too. I think that it is a known fact that there is restoration." (T.163) Thus, Mr. Norton conceded that the most valued and celebrated "Susanna" executed by Tintoretto has been the subject of a restoration. Still, Norton sat testifying that the painting in question should have its value reduced by some $148,000.00 simply because his black light discerned restoration of the subject painting. Finally, Norton did admit that many Tintorettos have "so much restoration," attributing it to the fact that the Italians and Spaniards did not care for their pictures. (T.164)

The last portion of Mr. Norton's testimony was devoted to his knowledge on the current state of the art market. It is submitted that his testimony on the valuation of the subject painting was shameful.

All that Mr. Norton offered were some irrelevant recollections as to Tintoretto sales which he stated took place between 1969 and 1972, long after the date of the gift in question. (T.150) Mr. Norton stated that he recalled these figures from some catalogs that he had read, but on cross-examination he quickly conceded that he had no idea whether the paintings he was recalling were authentic or not -- he simply had read these books and nothing more. (T.150)

His testimony with respect to the sale of "Christ at the Pool of Bethesda" in 1963, was simply incredible. When asked on cross-examination if he were familiar with the sale, he stated that he thought that Tintoretto "brought $60,000.00." (T.150) In evidence at that point were two sworn affidavits from petitioners' experts setting forth that sale at $160,000.00. When counsel for petitioners put the question to him once more, Mr. Norton noted the vast discrepancy between the exhibit and his testimony and said, "Well, I said around 60,000 pounds." (T.151) The Court immediately noted this peculiarity and queried as to why the witness used pounds in this one instance. (T.151) A garbled response was given, but in any case the nature of the falsehood was evident -- 60,000 pounds is a long way from $60,000.00.

In summary, Mr. Norton had no credentials as an authenticator of fine art, particularly Italian 16th Century fine art. He was called one week before trial, examined the painting for forty minutes and ventured his opinion that it was worth $2,000.00 based on his "instincts." His statements on the current art market value were of no materiality to the issue in the case whatever, inasmuch as they dealt with the 1973 market condition. Finally, Mr. Norton's testimony with respect to the one major Tintoretto sale in the last decade was either so grossly inaccurate

that it colors the rest of his testimony, or Mr. Norton was not being truthful.

In summary, the petitioners' witnesses offered unrebutted, expert testimony which clearly sustained their burden of proving the claim by a fair preponderance of the credible evidence. In marked contrast, the respondent offered two eleventh-hour recruits, neither of whom had ever authenticated a painting. The result at trial would have been foreseeable if it were the petitioners who offered the likes of such unreliable witnesses. The respondent distinctly failed to rebut the proof of the petitioners, and accordingly, the judgment should be reversed.

CONCLUSION

It is respectfully submitted that the decision of the Tax Court should be reversed.

Respectfully submitted,

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Court Press Form No. 2-Affidavit.
H.15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SID FARBER and NADIA FARBER,

Petitioners-Appellants,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 30th day of May, 1975, he served two copies of the Brief for Petitioners-Appellants on Scott P. Crampton, Assistant Attorney General

the attorney for the Appellee by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorney at No. Tax Division, U. S. Dept. of Justice, ( ) ~~N.Y.~~, Washington, D. C. 20530 that being the address designated by him for that purpose upon the preceding papers in this action.

David F. Wilson

Sworn to before me this
30th day of May, 1975

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976